

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS MAGYAR,

Plaintiff-Appellant,

V

MICHAEL BARNES and DIANE BARNES,

Defendants-Appellees.

UNPUBLISHED

March 22, 2012

No. 299118

Saginaw Circuit Court

LC No. 09-005785-NO

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent.

Plaintiff asserts that he was injured on February 9, 2008, at approximately 6:30 in the evening when he slipped on ice that had formed on the outside entry steps of the house in which he was living. The house had been rented by his mother from defendant. Accordingly to plaintiff's allegations and proofs, the roof of the house lacked any rain gutters (also known as eaves troughs) and the roof was constructed in such a manner so that water from melting snow would empty onto both of the front and back entryways where it would present a hazard upon refreezing.

Plaintiff conceded that he accepted the responsibility to remove snow and ice from the entry stairs. However, Defendant's common law duty was not limited to removal of snow and ice after it formed, but to provide reasonably safe premises. Whether the failure to install rain gutters under these circumstances constituted a breach of this duty is a jury question.

The evidence does not provide grounds for dismissal under the open and obvious doctrine. Plaintiff was asked point-blank in his deposition whether or not he saw any ice in the area prior to his fall that evening and he stated, "When I came home from work it was dark. The light where the porch is doesn't shine down. You have a two foot black shadow. You can't tell."¹ The defendant has not rebutted this testimony with any testimony or evidence whatsoever

¹ In light of this testimony, I disagree with the lead opinion's conclusion that "the parties did not present evidence about whether the ice was visible on casual inspection."

that the ice was visible. Moreover, given that plaintiff knew his mother had de-iced the steps that very morning and there had been no intervening precipitation he had every reason to conclude that the steps were safe. Finally, to the degree that the hazard was open and obvious it was effectively unavoidable since the only other entrance to the home, the rear entrance was in even worse condition than the front entrance as demonstrated in plaintiff's testimony and photographic exhibits neither of which defendant has attempted to rebut.

/s/ Douglas B. Shapiro